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No. [redacted] 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
RAYMOND WOOD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MEMORANDUM OF RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 948.

THE UNITED STATES OF AMERICA,
Petitioner,
v.
RAYMOND WOOD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MEMORANDUM OF RESPONDENT.

Respondent does not object to the granting of the Petition herein. We suggest however that the decision below seems clearly right. The mere fact that in the Federal courts the qualifications of jurors are the qualifications of jurors in the highest court of the State is no authority for the belief that Congress can make such

qualifications anything it wants. Congress in providing for the qualifications of jurors must operate within and not outside of the Constitution, in particular, Article III, Section 2, Clause 3, giving the right to trial by jury in criminal cases, the Sixth Amendment guaranteeing the right to trial by an *impartial* jury, and the Fifth Amendment guaranteeing due process of law. Two of these limitations do not obtain in the case of the States and as suggested by the late Mr. Justice Holmes in *Ashe v. United States,* 270 U. S. 424, the States can make pretty much anything they want Due Process in criminal cases, within, of course, obvious limitations. And so it may be that the States could provide by statute that employees were not disqualified by their employment in a criminal case involving their employer.

In the Federal law the opposite is true. The requirement of the Sixth Amendment that the jury shall be impartial necessarily restricts legislative activities. The right guaranteed must be viewed in the light it existed at the time of the enactment of the Constitution and its Amendments, at which time the relationship of employer and employee worked an absolute disqualification, and this was true at common law.(1) The basis of the disqualification is pointed out in *Crawford v. United States,* 212 U. S. 183, which is that where there is *interest* there is likely to be bias and prejudice, and the employee naturally has interest on the side of the employer. This situation cannot be remedied by any question put to the juror on the *voir dire* because as

(1). The requirement of impartiality goes back to the year 1150; see Beames' Granville, Beal's Ed., L. 2, c. XII; see also, Bracton Folio 185 A; Mirror of Justice, Ed. Robinson, chap. 3, Section 15, p. 153; Statute of 28 Edw. I; 25 Edw. III; V c. 3; 34 Edw. III, c. 4; Coke Litt., p. 155, Note d; p. 155-156, Note e. Blackstone states that at common law the relationship of employer and employee works an absolute disqualification and can be made the basis of a challenge for cause. 3 Black. Com., 358 et seq.

pointed out in several cases including the *Crawford* case the juror's answer being in the nature of a surmise as to his state of mind and prospective feelings, is untrustworthy. Therefore, unless there is an absolute disqualification there is no protection and this is probably the basis of the sensible common law rule.

Certainly the repeal of the common law disqualification and the destruction of a common law challenge for cause, which is what the present statute amounts to, leaves the defendant worse off with respect to getting an impartial jury than he was prior to the present statute and worse off than he was when the Constitution and the Amendments were enacted. This is sufficient. This Court has recently, in *Patton v. United States,* 281 U. S. 276, 289-290, reiterated its respect for the maintenance of trial by jury in all its traditional vigor. The present statute seems a clear diminution of the right within the meaning of this Court's holding in the *Patton* case.

Incidentally, the present statute is likewise discriminatory in violation of the Fifth Amendment. It must be remembered that the Government too has the right to challenge for cause in a criminal case. This right is left undisturbed by the present legislation, which, to even matters up, does not provide that employees of the defendant shall be conclusively presumed to be unbiased and qualified for jury service and not exempt therefrom. The Government, therefore, can challenge for cause employees of the defendant whereas the defendant cannot challenge for cause employees of the Government.

It might also be remarked that the present legislation renders qualified as jurors in a criminal case persons who have always, even at common law, been disqualified in ordinary civil cases.(1)

Conclusion.

We do not oppose the granting of the Petition herein. We feel, however, that the Court below was correct and that its opinion sufficiently takes care of the situation.

Respectfully submitted,

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(1) See, Central Ry. Co. v. Mitchell, 63 Ga. 173, 180; Temple v. Georgia Ry. Co., 82 S.E. 777, 779. See also as to various civil disqualifications in similar relationships:

Hufnagle v. Delaware etc., Co., 76 Atl. 205 (Pa.), 40 L.R.A.N.S. 978, employee of a corporation in an action against it.

Jones v. Ford, 134 N.W., 569 (Ia.), 38 L.R.A.N.S. 777, attorney and client.

Co. Litt., 1576; 3 Black. Com. 363; Tidd's Prac. (4th Amer. Ed. 853), master and servant.

Georgia Ry. Co. v. Tice, 50 S.E. 916 (Ga.), servants of lessee who are also servants of lessor.

5 Bacon's Abridgement, 352; Co. Litt., 158 A, 157 B, landlord and tenant, at common law.

Stone v. Monticello Construction Co., 40 L.R.A.N.A. 126, stockholder.

Walter v. Louisville Ry. Co., 150 S.W. 824 (Ky.), 42 L.R.A.N.S. 126, relativee of stockholders in a corporation.

Quay v Duluth Ry. Co., 116 N.W. 1001, 18 L.R.A.N.S. 250, cases of contractual relationship.

See Note L.R.A. 1915 A, 154 et seq., one interested in an indemnity company which would have to pay the judgment.